

APPENDIX M



U.S. Department
of Transportation

Memorandum

**Federal Highway Administration
Federal Transit Administration**

Subject: **INFORMATION:** Additional Supplemental Guidance
for the Implementation of the Circuit Court Decision
Affecting Transportation Conformity

Date: June 18, 1999

From: Kenneth R. Wykle
Administrator
Gordon J. Linton
Administrator

Reply to
Attn. of: HEPN

To: FHWA Division Administrators
Federal Lands Highway Division Engineers
FTA Regional Administrators

On March 2, 1999, the United States Court of Appeals for the District of Columbia Circuit issued a decision on EPA's third set of transportation conformity amendments in response to a case brought by the Environmental Defense Fund. On April 16, 1999, the Department of Justice, EPA, and DOT decided not to appeal the Court of Appeals decision. Both the EPA and DOT feel that we can work within the ruling, and EPA will be providing revised conformity regulations that implement this ruling in the near future. This memorandum supersedes the interim guidance issued on March 31, 1999, and the Supplemental Guidance issued on May 7, 1999. The guidance that was contained in the May 7, 1999, memorandum remains unchanged, but has been incorporated into this memorandum so that all of our guidance in response to the court decision is contained in a single document. This memorandum provides further guidance on active design and right-of-way acquisition projects for nonexempt projects.

Grandfathering:

The decision holds that projects that had previously been found to conform and had completed the National Environmental Policy Act (NEPA) process (grandfathered projects) may not be advanced (that is, such projects should not be approved) in nonattainment and maintenance areas which do not have a currently conforming plan and transportation improvement program (TIP). Thus, in such areas, you should not make any approvals or grants for further development of projects (i.e., completion of NEPA process, final design, right-of-way acquisition, or construction). The only projects which can receive further approvals or grants during a plan and TIP conformity lapse are: (1) projects exempt from the conformity process; and (2) transportation control measures (TCMs) which are included in an approved State implementation plan (SIP).

Projects that received funding commitments (plans, specifications, and estimates (PS&E) approval, full funding grant agreement (FFGA), or an equivalent approval or authorization) before the court decision will not be stopped or otherwise penalized, even if the funding was committed during a lapse. However, subsequent phases of a project for which FHWA has not taken an approval action may not proceed in the absence of conformity. For transportation projects not requiring a project specific PS&E approval, you should instruct the State or local transportation agency not to take actions committing the State or local agency to proceed with the project during a lapse unless the project has already received full approval or authorization for funding before the lapse, or before the March 2, 1999, court decision.

When a community is facing a conformity determination lapse within 6 months, FHWA, FTA, and EPA will meet and jointly evaluate the potential consequences of the lapse and assess any concerns. The FHWA, FTA, and EPA will meet at least 90 days before a conformity lapse to determine which projects could receive funding commitments before the lapse, and which projects could potentially be delayed, and the actions that would be necessary to correct the lapse.

When a conformity lapse is imminent or actually occurs, FHWA Division Administrators and FTA Regional Administrators shall notify the Governor or the Governor's designee immediately to inform him/her of the consequences, and potential solutions to minimize disruptions to the transportation programs in the respective nonattainment and maintenance areas. The FHWA and FTA will consult with EPA regional offices before notifying the Governor or the Governor's designee of conformity consequences and solutions.

Design and Right-of-Way Acquisition Projects:

Upon further evaluation of the court decision, we have determined that only those highway projects which have received approval of PS&Es, and transit projects that have received a FFGA, or equivalent approvals, prior to the conformity lapse (or the March 2, 1999, decision which ever is later) may proceed during a conformity lapse. This conclusion is based on the Court's holding that FHWA and FTA cannot approve, accept or provide funds to projects in the absence of a currently conforming plan and TIP. In view of this holding, we have determined that only those projects that have received approval of PS&E, a FFGA, or equivalent approvals, described above, may proceed during a lapse.

Accordingly, we can not continue to fund active highway design and right-of-way acquisition projects (except for exempt activities) during a conformity lapse, regardless of whether or not these projects were approved before the conformity lapse, or court decision. Likewise, funding for active transit design and right-of-way acquisition projects (except for exempt activities) which received a grant, other than a FFGA, may not continue unless: 1) FTA approved the grant before the conformity lapse or court decision, and 2) the grantee has already executed a contract for construction, or for a major capital acquisition like procurement of rolling stock.

Design and right-of-way acquisition for exempt projects contained in 40 CFR 93.126 and 93.127, and TCMs in an approved SIP may continue. This includes engineering and design activities that are necessary to assess social, economic, and environmental effects of the proposed action or alternatives as part of the NEPA process. However, as noted above, we can not complete the NEPA process (i.e., approve a CE, FONSI, or FEIS) until the area has reestablished conformity.

Consequently, the following guidance will apply to active design and right-of-way projects described above that are not covered by a PS&E approval, a FFGA, or equivalent approval in areas that are in a conformity lapse:

- 1) Federal-aid highway and transit funds may not be used to continue active design projects effective 40 days after the date of this memorandum. State DOT's, transit operators, and/or other appropriate transportation officials will be notified in writing by the Division Administrators and/or the FTA Regional Administrators of this new provision. If the State or locality continues with completion of design work after the 40-day period, costs incurred after the 40-day period will not be eligible for Federal funding, nor for use as a soft match. For highway design projects that are being advanced under FHWA's Advanced Construction (AC) provisions, only those costs incurred prior to the expiration of the 40-day period may be converted to a regular Federal-aid project, if a State so chooses, after the area reestablishes conformity.
- 2) State and local officials shall also be notified that Federal-aid highway and transit funds may not be used for preliminary right-of-way acquisition activities as well as actual property acquisition, except for acquisition of those parcels where an initial offer to acquire was made to the property owner prior to the receipt of the notification, and for a situation where a hardship acquisition or protective purchase may be justified using the qualifying criteria as set out in 23 CFR 712.204(d)(1)(A)&(B) or 23 CFR 771.117(d)(12). If the State or locality continues with completion of the right-of-way projects during the conformity lapse, the costs incurred will not be eligible for Federal funding, nor may credit be received for the value of the property under the provisions of 23 U.S.C 323. For highway right-of-way acquisition projects that are being advanced under FHWA's AC provisions, only those costs incurred prior to the notification may be converted to a regular Federal-aid project, if a State so chooses, after the area reestablishes conformity.
- 3) State and local transportation officials that routinely receive title 23 or title 49 funds should be encouraged not to advance design or right-of-way activities for regionally significant non-Federal highway and transit projects, unless the projects were approved or adopted prior to the conformity lapse or the March 2, 1999, decision which ever is later.

The above procedures will be applicable to future conformity lapses, except that federally-funded design activities shall be terminated in accordance with a State's (or local agency's) applicable termination for convenience provisions.

Use of Submitted SIP Emissions Budgets:

The decision held that conformity determinations can no longer be based on submitted SIP emissions budgets, prior to a positive adequacy determination by EPA. Consequently, the areas in which submitted SIP emissions budgets were used to determine conformity shall be governed by the following guidance:

(1) Submitted SIP emissions budgets which were found adequate by EPA

In areas where the SIP emissions budget has been declared adequate by EPA in compliance with 40 CFR, section 93.118(e) (4), the conformity determination remains valid. A list of these areas will be published in the Federal Register shortly.

(2) Submitted SIP emissions budgets used for conformity determinations with NO prior EPA actions

(a) For SIP emissions budgets that were submitted before the court decision and already used for conformity determinations, EPA will quickly attempt to make an adequacy determination using the criteria in the existing conformity rule:

- If the record of the State's public process contains no adverse comments about the submitted SIP emissions budget's adequacy (or the State has appropriately addressed the comments), EPA will send a letter confirming the adequacy determination to the States, metropolitan planning organizations (MPOs), etc. The EPA will announce these adequacy determinations in a Federal Register notice (no public comment) shortly.
- If the record of the State's public process contains adverse comments about the submitted SIP emissions budget's adequacy that weren't addressed by the State, EPA will issue an interim final rule that determines adequacy. The adequacy determination would take effect immediately upon publication, to be followed by a public comment period and final rule.

(b) Where EPA does not find a submitted SIP emissions budget adequate, the MPO and DOT can reestablish conformity if it is demonstrated with the following tests:

- Submitted SIP emissions budget plus build/no-build and/or 1990 test¹ for every analysis year and pollutant for which a submitted SIP was used; or

¹For moderate and above ozone areas and moderate above 12.7 ppm and serious CO areas, build/no-build and less-than-1990 tests should be used. For NOx and PM-10 areas and all other ozone and CO areas, the build/no-build or no-greater-than-1990 test should be used. The requirements of the tests are described in 40 CFR, section 93.119.

- Approved SIP emissions budget for every analysis year for which a submitted SIP was used.

Conformity can be reinstated provided that there is an opportunity for public review and comment on any conformity emissions tests. The MPOs should determine through the interagency consultation process, that has been established for each area, the appropriate level of public involvement and interagency consultation that is necessary. At a minimum, the MPO should notify the public of what was done and why, so that the public is informed and has an opportunity to comment on the findings. The MPO should provide reasonable public access to technical and policy information considered by the agency as required by 40 CFR, section 93.105(e). Information on additional conformity tests and public involvement should be submitted to the FHWA division and FTA regional offices. The DOT offices will review this information, in consultation with EPA, and send the MPO a letter once it is determined that conformity should be reinstated.

If new analyses are required, the MPO would need to again conduct a public involvement process, since this had not occurred in the past. Conformity can also be reinstated if an MPO had already completed the conformity tests described above and public involvement occurred. For example, a MPO may have done the build/no-build and less-than-1990 tests in its previous plan/TIP conformity determination, even though it was not required. In this case, additional public involvement would not be necessary if the public had already had an opportunity to comment on these conformity tests. The MPO would simply submit to DOT the previous analyses and evidence that public involvement had occurred; new analyses and public involvement would not be necessary.

(c) Until EPA finds a SIP emissions budget adequate or the MPO and DOT reestablish conformity determination, conformity is suspended. The DOT will not make further project approvals in these areas, except for exempt projects and TCMs in an approved SIP.

(3) Future submitted SIP emissions budgets

For SIP emissions budgets submitted in the future (or already submitted but not yet used to determine conformity), EPA will complete the adequacy finding within approximately 90 days of EPA's receipt of the SIP emissions budget in accordance with a proposed process that EPA will be issuing.

Other Issues:

The EPA, in coordination with DOT, will be issuing additional guidance on the following areas covered by the court decision through the rulemaking process:

- The ruling invalidates a provision of the regulation dealing with the approval of regionally significant non-Federal projects in areas in conformity lapse. The EPA, in consultation with DOT, issued additional guidance on this issue on May 14, 1999.

- Areas which have their SIP disapproved will no longer have a 120-day grace period in which to complete an ongoing conformity analysis. Thus, on the effective date of an EPA SIP disapproval, only projects in the plan and in the first 3 years of the TIP that are in place at that time can go forward, as described in 40 CFR, section 93.120(a)(2). The EPA issued guidance on when disapprovals will become effective on May 14, 1999.
- The court struck down 40 CFR, section 93.124(b), thus submitted SIPs that allocate a portion of the emissions “safety margin” to mobile sources can not be used until they are approved by EPA.

If you have questions on this supplemental guidance, please contact Mr. James Shrouds (202) 366-2074 or Ms. Cecilia Ho (202) 366-9862 of FHWA, or Mr. Abbe Marner (202) 366-4317 of FTA. If you have a specific question concerning right-of-way acquisition, please contact Dick Moeller (202) 366-2018 of FHWA, or Ann Catlin (202) 366-1647 of FTA.

cc: FHWA Resource Center Directors

*Additional Supplemental Guidance
for the Implementation of the Circuit Court Decision
Affecting Transportation Conformity, June 18th 1999*

Questions and Answers

- 1 Do the limitations on project development (e.g., design and right-of-way activities) during a conformity lapse, as described in the June 18th guidance, apply only to non-exempt projects?**

Ans. Yes. The limitations on project development apply only to non-exempt projects. A non-exempt project is any project not included in the list of exempt projects in the conformity regulation (40 CFR 93.126 and 93.127), or the project is not a TCM in an approved SIP.

- 2 Can FHWA take any NEPA action on non-exempt projects during a conformity lapse?**

Ans. Engineering and design activities that are necessary to assess social, economic, and environmental effects of the proposed action or alternatives as part of the NEPA process for a non-exempt project may continue during a lapse since these are exempt activities in the conformity regulation. However, FHWA cannot complete the NEPA process (i.e., approve a CE, FONSI, or FEIS) on non-exempt projects during a conformity lapse.

- 3 Can FHWA take any NEPA action on exempt projects during a conformity lapse?**

Ans. Yes. The restrictions described in Question 2 above do not apply to exempt projects. Consequently, the NEPA process can be completed for exempt projects during a conformity lapse.

- 4 Can State or local governments continue to fund design and right-of-way projects during a conformity lapse even though they were notified by the FHWA Division Administrators of a halt in Federal funding during a lapse? What are the consequences?**

Ans. State and local agencies are encouraged to not continue with completion of the design and right-of-way acquisition projects with non-federal funds after the notification to stop Federal-aid highway funds becomes effective. If such phases are advanced, any costs incurred during this period (after the notification effective date and before the re-establishment of conformity) will not be eligible for future federal reimbursement, can not be used as soft match, nor can credit be received for the value of property under the provisions of 23 USC 323. For highway design and right-of-way acquisition projects that are being advanced under FHWA's Advanced Construction (AC) provisions, only those costs incurred prior to the notification effective date may be converted to a regular Federal-aid project, if a State so chooses, after the area establishes conformity. If the State and local agencies continue with non-federal funds during the lapse, projects will not lose eligibility for future federal funding once conformity is re-established.

5 How much time do the State and local agencies have before design and right-of-way acquisition projects are no longer eligible for federal funds when a conformity lapse occurs?

- Ans.*
1. If the area is in conformity lapse on or before June 18, 1999, federal-aid highway funds may not be used for design projects 40 days after the June 18, 1999, guidance was issued (i.e., July 28, 1999). For future conformity lapses, (conformity lapse occurs after June 18, 1999), federally-funded design projects shall be terminated in accordance with a State's (or local agency's) applicable termination for convenience provisions. This is a provision that is typically included in a State's contractual agreement with a consultant or contractor. So for example, if this provision includes a 30-day termination clause, Federal funds for design projects would end 30 days after the effective day of the conformity lapse.
 2. When a conformity lapse occurs, the State and local officials will be notified that Federal-aid highway funds may not be used for preliminary right-of-way acquisition activities as well as actual property acquisition, except for acquisition of those parcels where an initial offer to acquire was made to the property owner prior to the receipt of the notification, and for hardship acquisition or protective purchase using the qualifying criteria as defined in 23 CFR 712.204(d)(1)(A)&(B). The 40-day notification period for design projects does not apply to right-of-way acquisition projects.

6 If the design and right-of-way acquisition phases of a non-exempt project were originally authorized prior to March 2, 1999, can additional design activities and parcel acquisitions continue to be authorized?

Ans. FHWA can not continue to fund active highway design and right-of-way acquisition projects for non-exempt projects during a conformity lapse, regardless of whether or not these projects were approved before the conformity lapse, or court decision.

7 Do these restrictions apply to regionally significant non-federal projects?

Ans. Regionally significant non-federal projects that are sponsored by State and local agencies that routinely receive title 23 or title 49 funds can only be advanced during a conformity lapse if they were approved or adopted prior to the lapse. State and local sponsors should be encouraged not to advance design or right-of-way activities for such regionally significant non-Federal projects unless the projects were approved before the lapse.

8 What projects can proceed during a conformity lapse?

Ans. The following projects are allowed to proceed during a conformity lapse;

1. Exempt projects
2. Transportation Control Measures (TCMs) included in an approved SIP
3. Projects that received funding commitments for construction (PS&E; approval or an equivalent approval or authorization) prior to the lapse

In order to advance these projects, they need to be included in a plan and TIP and meet all planning requirements.

Additional Questions and Answers¹

For the June 18th 1999

Guidance Implementing the Circuit Court Decision Affecting Transportation Conformity

9	Can FHWA take any NEPA action on TCMs that are included in an approved SIP during a conformity lapse?
<i>Ans.</i>	Yes, the NEPA process can be completed for TCMs, which are included in an approved SIP, during a conformity lapse. NEPA can be completed for exempt projects and TCMs in an approved SIP during a conformity lapse.
10	The guidance states that "federally-funded design projects shall be terminated in accordance with a State's (or local agency's) applicable termination for convenience provisions." Is it acceptable for a State to "suspend" rather than "terminate" the design contract during a conformity lapse?
<i>Ans.</i>	Yes, a State or local agency can choose either to terminate or suspend the contractual agreement with a consultant or contractor for design projects under the condition specified in the termination clause. For example, if the contractual agreement includes a 30-day termination clause, the contracts for the design projects should either be terminated or suspended and Federal funds for design projects would end 30 days after the effective day of the conformity lapse. Any costs incurred during the lapse associated with contract suspension or termination will not be reimbursed.
11	When should the Governor or Governor's designee be notified of the consequences of conformity lapse and potential solutions to minimize disruptions to the transportation programs?
<i>Ans.</i>	FHWA Division Administrators and FTA Regional Administrators are encouraged to notify the Governor or the Governor's designee as soon as practical after FHWA, FTA, and EPA have met to discuss the potential solutions to, and consequences of, a conformity lapse.
12	For a highway design or right-of-way project that has been authorized under FHWA's Advanced Construction (AC) provisions and where costs have been incurred prior to the notification effective date or the conformity lapse, can the project be converted to a regular Federal-aid project during a conformity lapse?
<i>Ans.</i>	Yes. However, only partial conversion of the AC project is allowed with obligation of Federal funds limited to the Federal share of eligible design or right-of-way costs incurred prior to the effective date of the notification, or the conformity lapse, whichever is later. Full conversion of the AC project to a regular Federal-aid project can take place only after the area re-establishes conformity.

¹Questions 1 through 8 are included in the first set of Q's & A's distributed on July 1, 1999